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No. _____

In The

Supreme Court of the United States

October Term, 1997

CONTINENTAL MARITIME OF SAN DIEGO, INC.,

Petitioner,

v.

JAMES LENANE,

Respondent.

On Petition For A Writ Of Certiorari To The Fourth District Court Of Appeal In And For The State Of California

PETITION FOR WRIT OF CERTIORARI

B. JAMES FINNEGAN, ESQ.
Counsel of Record
ELLEN SIMS LANGILLE, ESQ.
FINNEGAN, MARKS & HAMPTON
1990 Lombard Street, Suite 300
San Francisco, CA 94123
Telephone: (415) 931-9284

GARY A. ANGEL, ESQ.
445 Bush Street, Fourth Floor
San Francisco, CA 94108
Telephone: (415) 788-5935

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Both the federal Longshore and Harbor Workers' Compensation Act and the California Workers' Compensation Act function as the exclusive remedy for injured workers as against their employers (maritime and state, respectively). The California Workers' Compensation Act contains a specific exception to its exclusive remedy provision, which allows an injured worker to pursue a tort cause of action against an employer for failure to install a point of operation guard on a power press. But the federal Longshore and Harbor Workers' Compensation Act contains no such exception to its exclusive remedy provisions.

The question presented by this case is whether the exclusive remedy provision of the LHWCA preempts and bars an injured maritime worker from pursuing a tort claim of action under the statutory exception to the California Workers' Compensation Act, when such maritime worker has accepted the jurisdiction of the LHWCA and when the LHWCA does not contain any similar exception to its exclusive remedy provisions.

LIST OF RELATED CORPORATIONS [RULE 29.1]

Petitioner Continental Maritime of San Diego, Inc., is a California corporation, and is a wholly owned subsidiary of Continental Maritime Industries, Inc., also a California corporation. Continental Maritime Industries, Inc., is a wholly owned subsidiary of Newport News Shipbuilding Inc.

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PETITION FOR A WRIT OF CERTIORARI

Continental Maritime of San Diego, Inc., respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal for the Fourth District of California in this case.

OPINIONS BELOW

The opinion of the Court of Appeal is reported at 61 Cal. App.4th 1073, 72 Cal. Rptr.2d 121 (see Appendix-1). The opinion of the Superior Court is unreported (see Appendix-25).

JURISDICTION

The judgment of the Court of Appeal of California, Fourth Appellate District, was entered on February 27, 1998 (see Appendix-1). A timely Petition for Hearing was denied without opinion by the California Supreme Court on May 20, 1998 (see Appendix-26). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

33 U.S.C. § 905: Exclusiveness of Liability. (a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . . .

California Labor Code § 3602: Employer's personal liability. (a) Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation is, except as specifically provided in this section and Sections 3706 and 4558, **the sole and exclusive remedy of the employee or his or her dependents against the employer,** and the fact that either the employee or the employer also occupied another or dual capacity prior to, or at the time of, the employee's industrial injury shall not permit the employee or his or her dependents to bring an action at law for damages against the employer. . . .

California Labor Code § 4558: Definitions; employee's action against employer; injury from absence of power press guard. . . . (b) An employee, or his or her dependents in the event of the employee's death, may bring an action at law for damages against the employer where the employee's injury or death is proximately caused by the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press, and this removal or failure to install is specifically authorized by the employer under conditions

known by the employer to create a probability of serious injury or death.

STATEMENT OF THE CASE

How The Federal Question Was Presented

The important federal question sought to be reviewed by this Petition is whether federal preemption acts to bar an employee from seeking a tort remedy pursuant to an exception to a state workers' compensation scheme. This issue was first raised in the trial court via Continental Maritime's Motion for Summary Judgment. The trial court granted summary judgment in favor of Continental Maritime, and the claimant appealed. Once again, the issue of federal preemption was raised, briefed, and passed upon by the Court of Appeal, this time in favor of the claimant. The California Supreme Court declined to hear the case.

Concise Statement Of The Case

Petitioner Continental Maritime of San Diego ("Continental Maritime") is an employer exclusively engaged in the ship repair business. Claimant James Lenane was employed by Continental Maritime as a sheetmetal mechanic. On June 2, 1994, while in the course and scope of his employment in the sheetmetal shop at the Continental Maritime shipyard, claimant injured his left hand and suffered the loss of three fingers. Claimant filed claims for benefits under both the California Workers' Compensation Act and the federal Longshore and Harbor

Workers' Compensation Act. Although initial benefits were paid under the CWCA, the higher-paying federal LHWCA benefits were thereafter instituted retroactive to his date of injury.

In February 1995, claimant filed a civil suit against Continental Maritime as well as the manufacturer and distributor of the power press (Dreis & Krump Manufacturing Company and Meyer Machinery, respectively). The only cause of action alleged against Continental Maritime was under California Labor Code section 4558, which allows an injured employee to sue his employer for damages if the injury is incurred as the result of a knowing removal of (or a knowing failure to install) a point of operation guard on a power press. In its Answer, Continental Maritime alleged numerous defenses, including a defense of preemption by the exclusive remedy provision of the LHWCA.

Continental Maritime thereafter brought a motion for summary judgment on the grounds that the claimant's clause of action under Labor Code section 4558 was preempted and barred by the exclusive remedy provision of the LHWCA, and that claimant's exclusive remedy was the federal workers' compensation benefits under the LHWCA. The trial court agreed that the state cause of action was in direct conflict with the exclusivity provisions of the LHWCA, and granted summary judgment in favor of Continental Maritime.

On review, the Court of Appeal reversed, reasoning that the LHWCA was intended to supplement rather than supplant state workers' compensation laws, and that to uphold the summary judgment would have a net result of

reducing the level of state workers' compensation benefits available to the claimant.

The California Supreme Court denied Continental Maritime's Petition for Hearing without comment.

REASONS FOR GRANTING THE PETITION

The United States Supreme Court, in *Sun Ship, Inc. v. Pennsylvania*,[1] held that the Longshore and Harbor Workers' Compensation Act ("LHWCA")[2] was designed to supplement rather than supplant state workers' compensation schemes.[3] Hence, an employee could collect benefits under either system, so long as a credit was provided for benefits furnished under either system to prevent a double recovery by the injured worker.[4]

But unlike *Sun Ship*, this case does not simply involve a maritime employee's claim for workers' compensation benefits under a state system; instead, the claimant seeks a *tort* remedy against his employer, wherein he seeks civil damages *in addition* to compensation benefits.

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[1] *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 100 S.Ct. 2432, 65 L.Ed.2d 458 (1980).

[2] 33 U.S.C. § 901 et seq.

[3] *Sun Ship*, 447 U.S. at 720.

[4] 33 U.S.C. § 903: Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability or death for which benefits are claimed under this Act pursuant to any other workers' compensation law . . . shall be credited against any liability imposed by this Act.

Significantly, the LHWCA does not provide for credit for damages awarded in a civil action, where such civil action is allowed as an exception to the exclusive remedy provisions of a state's workers' compensation scheme. Thus, under the Court of Appeal's decision in this case, an injured worker would be allowed a double recovery – a result expressly prohibited by the U.S. Supreme Court in *Sun Ship*.

This Court should grant certiorari in order to prevent the State of California's alteration of the delicate balance between maritime employers and employees, achieved by Congress in its enactment of the LHWCA.[5]

1. The Court of Appeal decision fails to recognize that Congress fully intended for the LHWCA to preempt any state law tort remedy against maritime employers.

The Court of Appeal below held that the LHWCA did not preempt claimant's tort law cause of action based on a statutory exclusion to the state's workers'

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[5] *"[The LHWCA] was designed to strike a balance between the concerns of the longshoremen and harbor workers on the one hand, and the employers on the other.* Employers relinquished their defenses to tort actions in exchange for limited and predictable liability. Employees accept the limited recovery because they receive prompt relief without expense, uncertainty, and delay that tort actions entail." *Morrison Knudsen Construction Company v. Director, OWCP*, 461 U.S. 624, 636, 103 S.Ct. 2045, 76 L.Ed.2d 194 (1983) [emphasis added].

compensation act. *In fact, the LHWCA clearly satisfies all three approaches of finding preemption.*[6]

First, specific congressional intent to preempt is found within Section 905(a), which provides that an employer's liability under the Act is "exclusive . . . of all other liability to the employee." Courts have interpreted this broad language to evidence a clear congressional intent to preempt state law claims by injured longshoremen.[7] *Second,* the comprehensive nature of the LHWCA provides further evidence of congressional intent to preempt state law remedies.[8] The Ninth Circuit has stated

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[6] Preemption may be found (1) if the congressional intent is expressly stated, (2) if it can be inferred through the comprehensiveness or pervasiveness of the federal regulatory scheme, or (3) if the state law conflicts with federal law or even merely interferes with the accomplishment and execution of the congressional purpose. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984); *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280-281, 107 S.Ct. 683 (1987); *Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1415 (9th Cir. 1990).

[7] *See, e.g., Atkinson v. Gates, McDonald & Co.*, 838 F.2d 808, *reh'g en banc denied*, 844 F.2d 788 (5th Cir. 1988); *Texas Employers' Ins. Ass'n v. Jackson*, 820 F.2d 1406 (5th Cir. 1987) ("In a nutshell it is difficult to imagine a more comprehensive scheme of federal regulation – one that leaves no room for state involvement – than that contained in the LHWCA."), *vacated for reh'g* 828 F.2d 1 (5th Cir. 1987), *upheld on other grounds* 862 F.2d 491 (5th Cir. 1988).

[8] *See, e.g., Schreefel v. Okuly*, 143 Cal. App.3d 818, 825, 192 Cal. Rptr. 402 (1983) (Supremacy Clause prevents state comparative fault law from abridging employer's substantive federal right to recoup benefits paid under the Longshore Act). Ironically, the court which decided *Schreefel* is the same district court of appeal which decided this case.

that the LHWCA "is the *whole* source of rights and remedies" as between a longshore employer and employee.[9] *Third*, application of a tort law remedy would obstruct the purposes of Congress by depriving longshore employers of the benefit of limited liability to which they are entitled under the LHWCA.[10] The plain language of section 905(a) evinces an unmistakable intention to codify a *quid pro quo* whereby the employer provides no-fault compensation in exchange for immunity from tort damages.[11]

By failing to recognize the Congressional intent to preclude a maritime employee from seeking a tort remedy against his longshore employer for a work-related

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[9] *Crescent Wharf v. Barracuda Tanker Corp.*, 696 F.2d 703, 706 (9th Cir. 1983) (quoting *Nations v. Morris*, 483 F.2d 577, 588 (5th Cir. 1977), *cert. denied*, 414 U.S. 1071, 94 S.Ct. 584, 38 L.Ed.2d 477 (1977).

[10] *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, 953 (3rd Cir. 1990).

[11] *"[The LHWCA] is not a simple remedial statute intended for the benefit of the workers.* Rather, it was designed to strike a balance between the concerns of the longshoremen and harbor workers on the one hand, and the employers on the other. *Employers relinquished their defenses to tort actions in exchange for limited and predictable liability.* Employees accept the limited recovery because they receive prompt relief without expense, uncertainty, and delay that tort actions entail." *Morrison Knudsen Construction Company v. Director, OWCP*, 461 U.S. 624, 636, 103 S.Ct. 2045, 76 L.Ed.2d 194 (1983) [emphasis added]; *see also Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 281-292 & fn. 24, 101 S.Ct. 509, 66 L.Ed.2d 446 (1980); *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956).

injury, the Court of Appeal has prevented the national, uniform application of the federal maritime law.

2. The Federal Longshore and Harbor Workers' Compensation Act is not subject to the same exceptions as the California Workers' Compensation Act.

A. Because the claimant obtained benefits pursuant to the LHWCA, federal law applies and the state Court of Appeal should not have created new exceptions to the exclusivity provisions of the federal LHWCA.

Where an injured maritime worker receives benefits under the federal Longshore and Harbor Workers' Compensation Act, he is compensated under federal law, using federal standards.[12] Where federal law and standards diverge from applicable state law, considerations of federal supremacy require that the federal standards be applied – to the exclusion of the state law.

Unlike the numerous exceptions to the exclusivity provisions of the California Workers' Compensation Act, exceptions to the federal LHWCA are quite rare, and it is not the proper province of a state Court of Appeal to create new ones.

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[12] *Sun Ship v. Pennsylvania, supra,* 447 U.S. at 724; *see also Schreefel v. Okuly, supra,* 143 Cal. App.3d at 825.

B. Exceptions to the Federal LHWCA and the California Workers' Compensation Act are not co-extensive, and the state's exceptions should not be automatically applied to the Federal LHWCA.

It must be recognized that the two compensation acts at issue in this case are *different*, particularly in the nature of the exceptions each allows to its respective exclusivity provisions. Certainly, the LHWCA includes exceptions to its own exclusivity provisions, most notably when an employer fails to secure compensation.[13] In this instance, the LHWCA exception mirrors the California Workers' Compensation Act.[14]

But the CWCA allows numerous other exceptions which are *not* provided for within the LHWCA, and such state exceptions would do violence to the exclusivity provisions of the LHWCA if they were allowed to trump the federal law. For example, in addition to the "power press exception" which is specifically provided for by section 4558 (but is not mentioned in the LHWCA) the CWCA also allows tort claims by an injured worker against his employer for claims of willful physical

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[13] § 905(a) provides that liability under the Act is the exclusive remedy available to an injured employee, "except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee . . . may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages . . . ."

[14] § 3706 provides: "If any employer fails to secure the payment of compensation, any injured employee or his dependents may bring an action at law against such employer for damages, as if this division did not apply."

assaults by the employer,[15] where the employer is alleged to have fraudulently concealed the fact of industrial injury,[16] or where the employee purchases a product manufactured by the employer and is injured thereby.[17]

California courts have further expanded the number of exceptions to the CWCA's exclusivity provisions, allowing an employee to pierce the CWCA's exclusivity provisions where the employer has stepped outside its role as an employer, either by acting in a dual capacity,[18] or by committing an intentional tort.[19] California courts have even circumvented the CWCA's exclusivity provisions for claims of spoliation of evidence[20] or claims of *in utero* injuries.[21] *None of these exceptions is recognized by the LHWCA.*

If the Court of Appeal decision below is allowed to stand, the result would be to allow each individual state to graft its particular workers' compensation scheme's exclusions/exceptions onto the federal LHWCA, thus

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[15] Lab. C. § 3602(b)(1).

[16] Lab. C. § 3602(b)(2).

[17] Lab. C. § 3602(b)(3).

[18] *Duprey v. Shane*, 39 Cal.2d 781, 249 P.2d 8 (1952).

[19] *Unruh v. Truck Insurance Exchange*, 7 Cal.3d 616, 87 Cal. Rptr. 166 (1972).

[20] *Coca-Cola Bottling Co. v. Superior Court*, 233 Cal. App.3d 1273, 286 Cal. Rptr. 855 (1991) (workers' compensation); *but see Cedars-Sinai Medical Ctr. v. Superior Court*, 18 Cal.4th 1, 74 Cal. Rptr.2d 248 (1998) (no tort remedy for first party intentional spoliation).

[21] *Snyder v. Michael's Stores*, 16 Cal.4th 991, 68 Cal. Rptr.2d 476 (1997).

frustrating the very purpose behind the national, uniform maritime law.[22]

3. The Court of Appeal's decision in this case represents a dangerous and unwarranted extension of *Sun Ship*.

In reaching its decision below, the Court of Appeal has turned this Court's decision in *Sun Ship* on its head, and has wrongly applied the language from *Sun Ship* to allow an injured maritime employee not only the benefits available to him under a state workers' compensation scheme, but also that state's *tort law remedies*, which by their very nature fall outside the state's compensation scheme.

A. The Court of Appeal has erroneously interpreted this Court's holding in *Sun Ship* to allow a tort remedy based on an exception to a state's workers' compensation law.

The Court of Appeal purports to base its decision in this case on *Sun Ship*, reasoning that a finding of federal preemption would have "the net result [of reducing] the level of state workers' compensation benefits available,"[23] and that such a result would be in violation of this Court's directive in *Sun Ship* – that Congress intended to "supplement, not supplant or preempt, state

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[22] *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1919).

[23] *Lenane v. Continental Maritime of San Diego*, ___ Cal. App. 4th at ___, 72 Cal. App.2d 121, 130 (1998).

compensation benefits available to injured maritime employees."[24]

But Sun Ship never even addressed potential "exceptions" to state compensation schemes, much less a potential "back-door" application of state tort remedies.[25] Certainly, a finding of preemption in this case would not result in any "reduction of benefits available" – a tort remedy is simply not the type of compensation benefit which *Sun Ship* was designed to protect.

B. There is no chance of any "reduction in the level of state benefits" by refusing to apply the exception to the LHWCA.

A finding of preemption in this case would *not* result in a reduction of state workers' compensation benefits, as feared by the Court of Appeal below,[26] inasmuch as the state benefits would continue to be available pursuant to *Sun Ship* (subject to a credit in the longshore forum). But it would properly prevent any tort recovery *beyond* the state compensation benefits.

By refusing to find federal preemption, the Court of Appeal has allowed a dangerous extension of benefits

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[24] *Lenane, supra,* ___ Cal. App. 4th at ___, 72 Cal. Rptr.2d at 130; *Sun Ship, Inc. v. Pennsylvania, supra,* 447 U.S. at 720.

[25] In fact, *Sun Ship* specifically noted that there may be cause for preemption of a specific state statute, if not a state's entire compensation scheme. *Sun Ship, supra,* 447 U.S. at 724 fn. 6.

[26] *Lenane, supra,* ___ Cal. App. 4th at ___, 72 Cal. Rptr.2d at 129.

available to an injured maritime employee: Not only is he entitled to federal compensation benefits as well as state compensation benefits, under *Sun Ship*, but he is also entitled to tort law remedies available through an *exception* to the state's compensation system – exactly the tort law remedies that the federal compensation system was designed to preempt!

It is crucial to recognize that the Court of Appeal decision is an enormous extension of *Sun Ship*. This case does not merely involve a choice between competing benefit systems, as was presented in *Sun Ship*. Instead, it is a question of whether this Court should allow an *exception* to a state's compensation system to trump the Congressionally-mandated exclusivity provisions of the federal LHWCA.

C. The Court of Appeal fails to adequately distinguish *Peter v. Hess Oil*, and succeeds instead only in elevating form over substance.

The Court of Appeal decision attempts to distinguish *Peter v. Hess Oil Virgin Islands Corp.*,[27] a federal court decision holding that a longshoreman's tort action was barred by the LHWCA. In reaching that conclusion, the Third Circuit cogently explained Congress' intent that "compensation, not tort damages, were to be the primary source of relief for workplace injuries for longshoremen against their employers."[28] The Third Circuit specifically held that the LHWCA specifically preempted the local

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[27] *Peter v. Hess Oil Virgin Islands Corp., supra*, 903 F.2d 935.

[28] *Peter v. Hess Oil Virgin Islands Corp., supra*, 903 F.2d at 952.

workers' compensation law allowing tort recovery against the employer.[29]

In its effort to remove the instant case from this pointed authority, the Court of Appeal has struggled to create a semantic distinction – namely, that the *Peter v. Hess Oil* case involved a common law negligence action, whereas the instant case involved an exception to a statutory scheme of workers' compensation benefits. The Court of Appeal neglected to address the basic fact that *both* cases involved a tort law remedy specifically authorized by the local workers' compensation act.[30] In attempting to distance its own decision from *Peter v. Hess Oil*, all that the Court of Appeal managed to accomplish is the creation of a distinction without a difference.

In sum, the Court of Appeal's analysis of the exclusivity provisions, this Court's decision in *Sun Ship*, and the Third Circuit's holding in *Peter v. Hess Oil* is nothing more than a strained and awkward attempt to provide a recovery which is simply not authorized by Congress.

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[29] *Peter v. Hess Oil Virgin Islands Corp., supra,* 903 F.2d at 951-953.

[30] The claimant in *Peter v. Hess Oil* argued that the Virgin Islands Workers' Compensation Act allowed a "borrowed employee" to pursue a tort action against his employer; the federal court properly concluded that the exclusive remedy provision of the LHWCA preempted the conflicting state law and thus barred the tort action. *Peter v. Hess Oil Virgin Islands Corp., supra,* 903 F.2d at 953.

4. Certiorari should be granted to avoid the unfair result to all California longshore employers, who would be placed at a significant competitive disadvantage.

The Court of Appeal decision allowing a tort law remedy against the longshore employer in this case places all California longshore employers at a competitive disadvantage against out-of-state longshore employers who are immunized from civil tort claims.

Allowing workers covered by the LHWCA to proceed with such actions would severely disadvantage all California maritime employers, in contrast to maritime employers located in other states who do not face the same potential increased costs associated with insuring against or paying such claims. By single-handedly enlarging the scope of potential tort liability for longshore employers, the precedential value that this published decision will bear could have a devastating effect on the business climate for California-based longshore employers.

CONCLUSION

The Court of Appeal's result-oriented decision in this case acts to reinstate a tort recovery system, which LHWCA was specifically designed to replace. The Court of Appeal has thus ignored this Court's repeated admonishments that courts are not free to rewrite the LHWCA: "If the effects of the [LHWCA] are to be alleviated, that is

within the province of the Legislature. It is Congress that has the authority to change the statute, not the courts."[31]

This case represents not merely the application of a state scheme to a maritime employee, but the application of an *exception* to a state scheme to a maritime employee otherwise covered by the LHWCA. This employee's benefits and remedies are not threatened, nor is he in danger of being left without a remedy. To the contrary, his remedies are both provided in and limited by the LHWCA.

In this case, the Court of Appeal erroneously reasoned that preventing a maritime employee from asserting a tort claim against an employer would reduce the level of state workers' compensation benefits available to such employees. In fact, this employee was not seeking any benefit under the state's workers' compensation act, but an *exception* to that act – an ordinary tort remedy which is plainly barred by the exclusivity provisions of the LHWCA.

Because of the strong need for uniformity in federal maritime law,[32] state law should not be permitted to narrow or defeat any substantial rights under maritime law or to contravene the uniformity of maritime matters.[33]

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[31] *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 483-484 (1992).

[32] *Southern Pacific v. Jensen*, 244 U.S. 205 (1917) (no state legislation is valid if it contravenes the essential purpose expressed by an act of Congress); *see also Churchill v. F/V Fjord*, 857 F.2d 571 (9th Cir. 1988).

[33] *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1919).

Dated: August 17, 1998

Respectfully submitted,

B. JAMES FINNEGAN, ESQ.
Counsel of Record
ELLEN SIMS LANGILLE, ESQ.
FINNEGAN, MARKS & HAMPTON
1990 Lombard Street, Suite 300
San Francisco, CA 94123
Telephone: (415) 931-9284

GARY A. ANGEL, ESQ.
445 Bush Street, Fourth Floor
San Francisco, CA 94108
Telephone: (415) 788-5935

Counsel for Petitioners

James LENANE, Plaintiff and Appellant.

v.

CONTINENTAL MARITIME OF SAN DIEGO, INC., Defendant and Respondent.

No. D025295.

Court of Appeal, Fourth District, Division 1.

Feb. 27, 1998.

Tosdal, Levine, Smith & Steiner, Thomas Tosdal, Ann M. Smith and Fern M. Steiner, San Diego, for Plaintiff and Appellant.

Roy D. Axelrod, Littler, Mendelson, Fastiff, Tichy & Mathiason, Margaret C. Bell and James J. McMullen, San Diego, for Defendant and Respondent.

NARES, Associate Justice.

Plaintiff James Lenane, a sheetmetal mechanic who was employed by defendant Continental Maritime of San Diego, Inc. (CMSD), and performed ship repair work, suffered the amputation of three fingers in an industrial accident involving a power press machine. Lenane filed claims for workers' compensation benefits under both the California Workers' Compensation Act[1] (CWCA) and the Longshore and Harbor Workers' Compensation Act[2] (LHWCA).

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[1] Labor Code section 3200 et seq.

[2] 33 United States Code section 901 et seq.

Lenane also filed a tort action for damages against CMSD under California Labor Code sections 3602, subdivision (a) and 4558, which provide an exception to the exclusive remedy provision of the CWCA when an employee is injured as a result of the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press. A similar exception is not found in the LHWCA.

Claiming Lenane's tort action is preempted and barred by the Supremacy Clause of the federal Constitution and the exclusive remedy provision of the LHWCA (33 U.S.C. § 905, subd. (a)), CMSD brought a motion for summary judgment. The court agreed and granted summary judgment in favor of CMSD.

Lenane appeals, contending the court erred in granting summary judgment because Congress, in amending the LHWCA in 1972 to extend federal workers' compensation jurisdiction inland to cover shore-based maritime workers such as himself, intended to supplement rather than supplant state remedies; his cause of action under Labor Code section 4558 does not clearly conflict with the LHWCA; and thus his tort action against CMSD is not barred by the exclusive remedy provision of the LHWCA. We agree for reasons we shall discuss. Accordingly, we reverse the judgment.

FACTUAL BACKGROUND

The material facts are undisputed. Lenane was employed by CMSD as a sheetmetal mechanic at CMSD's shipyard, which is located on the waterfront of the San Diego bay. CMSD is engaged exclusively in the business

of ship repair and related work, and Lenane spent all of his work time at CMSD performing this work. When Lenane was not working aboard vessels, he worked in the sheetmetal shop at the CMSD shipyard.

On June 2, 1994, while Lenane was working for CMSD in the sheetmetal shop bending sheetmetal for vents, his left hand was crushed by a power press resulting in the partial or complete amputation of three fingers. Lenane filed a claim for California workers' compensation benefits under the CWCA, and began to receive temporary total disability and vocational rehabilitation benefits.

In July 1994 Lenane filed an application for adjudication with the California Workers' Compensation Appeals Board. He later filed a claim for federal workers' compensation benefits under the LHWCA. Through its workers' compensation carrier, CMSD began paying LHWCA benefits to Lenane retroactive to the date of his injury. Under the LHWCA, the weekly benefit increased $21.29 from the state benefit of $336 to the federal benefit of $357.29.

PROCEDURAL BACKGROUND

A. *Lenane's action against CMSD under Labor Code section 4558*

In February 1995, Lenane filed a complaint for damages against his former employer CMSD, Dreis & Krump Manufacturing Co. (the manufacturer of the press machine), and Meyer Machinery (the distributor of the machine). The only cause of action alleged against CMSD was the third cause of action under Labor Code section

4558,[3] which authorizes an industrially injured employee in California to sue his or her employer for damages if the employee is injured as a result of the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press.

In his section 4558 cause of action against CMSD, Lenane alleged (among other things) that CMSD was his employer within the meaning of subdivision (a)(1) of section 4558; the mechanical press brake that injured him was a power press within the meaning of subdivision (a)(4) of section 4558; the manufacturer of the press brake conveyed to CMSD in written materials that it required the attachment of point of operation guards for the press brake; CMSD knowingly failed to install point of operation guards on the press brake under conditions it knew would create a probability of serious injury; and Lenane was seriously injured by CMSD's knowing failure to install point of operation guards on the press brake.

CMSD answered Lenane's complaint and alleged numerous affirmative defenses, including the defense that Lenane's section 4558 cause of action was barred by the exclusive remedy provision of the LHWCA.[4]

B. *CMSD's motion for summary judgment*

Relying on the federal preemption affirmative defense pleaded in its answer, CMSD brought a motion for summary judgment on the ground Lenane's section

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[3] Subsequent unattributed references to section 4558 are to Labor Code section 4558.

[4] See 33 United States Code section 905, subdivision (a).

4558 cause of action was preempted and barred by the exclusive remedy provision of 33 United States Code section 905, subdivision (a)[5] of the LHWCA. CMSD maintained that federal workers' compensation benefits were Lenane's exclusive remedy under section 905(a) of the LHWCA, and his state cause of action for damages under section 4558 was in direct conflict with section 905(a) of the LHWCA. The court agreed and granted summary judgment in favor of CMSD.

STANDARD OF REVIEW

In evaluating the propriety of a grant of summary judgment our review is de novo, and we independently review the record before the trial court. (*Branco v. Kearny Moto Park, Inc.* (1995) 37 Cal.App.4th 184, 189, 43 Cal.Rptr.2d 392.) In practical effect, we assume the role of a trial court and apply the same rules and standards which govern a trial court's determination of a motion for summary judgment. (*Lopez v. University Partners* (1997) 54 Cal.App.4th 1117, 1121-1122, 63 Cal.Rptr.2d 359.)

Under Code of Civil Procedure section 437c, subdivision (c), a motion for summary judgment shall be granted if all the papers submitted show there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107, 252 Cal.Rptr. 122, 762 P.2d 46.)

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[5] Subsequent unattributed references to section 905(a) are to 33 United States Code section 905, subdivision (a).

Here, the trial court granted summary judgment in favor of CMSD solely upon the basis of its interpretation of statutory and case law applied to undisputed material facts. As we stated in *Rudd v. California Casualty Gen. Ins. Co.* (1990) 219 Cal.App.3d 948, 951-952, 268 Cal.Rptr. 624, "[i]t is well settled that the interpretation and application of a statutory scheme to an undisputed set of facts is a question of law [citation] which is subject to de novo review on appeal. [Citation.]. Accordingly, we are not bound by the trial court's interpretation."

DISCUSSION

This appeal presents an issue of law of first impression: whether the exclusive remedy provision of the federal Longshore and Harbor Workers' Compensation Act (LHWCA) set forth in section 905(a), preempts and bars an industrially injured, shore-based maritime employee's statutory cause of action for tort damages authorized by specified provisions of the California Workers' Compensation Act (CWCA) (specifically, Lab.Code §§ 3602, subd. (a), and 4558) when the employee's injury was allegedly caused by the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press. We conclude the exclusive remedy provision of the LHWCA does not preempt a cause of action for damages under section 4558 because (1) Congress, in amending the LHWCA in 1972 to extend federal workers' compensation jurisdiction inland to cover shore-based maritime employees, intended to supplement rather than supplant state remedies; and (2) such cause of action is consistent with Congress's intent to aid maritime laborers, and thus does not clearly conflict with federal

law. Accordingly, we conclude the court erred in granting summary judgment in favor of CMSD.

I. *Principles of Federal Preemption*

Because this appeal involves the issue of federal preemption of California workers' compensation legislation, we begin our analysis by reviewing the law governing federal preemption. In *Schneidewind v. ANR Pipeline Co.* (1988) 485 U.S. 293, 299-300, 108 S.Ct. 1145, 1150, 99 L.Ed.2d 316, the United States Supreme Court discussed the applicable principles which guide our analysis:

> " . . . A pre-emption question requires an examination of congressional intent. [Citation.] Of course, Congress explicitly may define the extent to which its enactments pre-empt state law. [Citation.] In the absence of explicit statutory language, however, Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law. Such a purpose properly may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where 'the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose.' *Rice v. Santa Fe Elevator Corp.* [(1947)] 331 U.S. 218, 230 [67 S.Ct. 1146, 1152, 91 L.Ed. 1447]. . . . Finally, even where Congress has not entirely displaced state regulation in a particular field, *state law is preempted when it actually conflicts with federal law. Such a conflict will be found* ' "when it is impossible to comply with both state and federal law,

> [citation], or *where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress* [citations]." ' " (Italics added.)

In *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407, the high court also explained that its respect for the "historic police powers of the States" underlies its reluctance to infer preemption in ambiguous cases:

> "Article VI of the Constitution provides that the laws of the United States 'shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.' [Citation.] . . . Consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.' [Citation.] Accordingly, ' "[t]he purpose of Congress is the ultimate touchstone" ' of pre-emption analysis. [Citations.]"

The high court described this reluctance to infer preemption in ambiguous cases as a "presumption against the pre-emption of state police regulation." (505 U.S. at p. 518, 112 S.Ct. at p. 2618.) In a separate concurring and dissenting opinion in *Cipollone* on behalf of himself and two other justices, Justice Blackmun explained that this presumption against preemption is based on the high court's respect for state sovereignty and principles of federalism.[6] (*Id.* at p. 533, 112 S.Ct. at p. 2626.)

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[6] Although Justice Blackmun, joined by Justices Kennedy and Souter, dissented from another portion of the majority's

The Supreme Court has admonished that "[e]ven though Congress has acted in the admiralty area, state regulation is permissible, absent a *clear conflict with the federal law.*" (*Askew v. American Waterways Operators, Inc.* (1973) 411 U.S. 325, 341, 93 S.Ct. 1590, 1600, 36 L.Ed.2d 280, italics added.)

II. *Statutory Frameworks Under the CWCA and LHWCA*

To determine whether the exclusive remedy provision of the LHWCA preempts Lenane's section 4558 cause of action for damages against his former employer CMSD, we must first briefly discuss the CWCA and LHWCA workers' compensation schemes, the section 4558 exception to the exclusive remedy provision of the CWCA, and the 1972 amendments to the LHWCA which extended federal LHWCA jurisdiction inland to cover certain shore-based maritime workers such as Lenane.

A. *CWCA and the exclusive remedy rule*

With certain statutory and judicial exceptions, a compensation claim under the CWCA provides the exclusive remedy against an employer for a work-related injury or death. (*Bonner v. Workers' Comp. Appeals Bd.* (1990) 225

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opinion in *Cipollone*, he stated, "I agree with the Court's exposition . . . of the underlying principles of pre-emption law. . . . " (*Cipollone v. Liggett Group, Inc., supra*, 505 U.S. at p. 531, 112 S.Ct. at p. 2625.)

Cal.App.3d 1023, 1032, 275 Cal.Rptr. 337.) "The legal theory supporting this exclusive remedy provision is a presumed 'compensation bargain' pursuant to which the employer assumes liability for the work-related personal injuries or death without regard to fault in exchange for limitations on the amount of that liability, while the employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of work-related injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort. According to this legislative 'quid pro quo,' the exclusive compensation law remedy supersedes common law and statutory remedies in the employment field and creates a different standard of rights and obligations in place of all prior rights and duties." (1 Hanna, Cal. Law of Employee Injuries and Workers' Compensation (2d rev. ed. 1997) § 11.01[1], pp. 11-8 – 11-9, fns. omitted.)

This CWCA exclusive remedy rule is codified in Labor Code section 3602, subdivision (a), which provides in part: "Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation is, except as specifically provided in this section and Sections 3706 and 4558, the sole and exclusive remedy of the employee. . . . " (Italics added.)

B. *Section 4558 exception to the CWCA exclusive remedy rule*

In enacting section 4558,[7] the California Legislature created an exception to the CWCA workers' compensation exclusive remedy rule in certain cases involving the noninstallation of power press guards. (*Uriarte v. United States Pipe & Foundry Co.* (1996) 51 Cal.App.4th 780, 782-783, 59 Cal.Rptr.2d 332.) One commentator has explained that section 4558 "creates an exception to the exclusive remedy rule in cases when an employer's removal of or failure to install a point of operation guard on a power press causes the injury or death of an employee. Thus the injured employee may bring a civil action for damages against the employer when the injury is proximately caused by the employer's knowing removal of or failure to install the power press guard and this removal or noninstallation is specifically authorized by the employer under conditions known by the employer to create a probability of serious injury or death." (1 Hanna, *supra*, § 11.02[5][a], p. 11-34, fns. omitted.)

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[7] Section 4558 provides in part: "An employee . . . may bring an action at law for damages against the employer where the employee's injury . . . is proximately caused by the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press, and this removal or failure to install is specifically authorized by the employer under conditions known by the employer to create a probability of serious injury. . . . " But it also provides that the employer will not be liable "absent proof that the manufacturer designed, installed, required, or otherwise provided by specification for the attachment of the guards and conveyed knowledge of the same to the employer. . . . " (§ 4558, subds. (b) and (c).)

As we have noted, section 4558 is expressly referenced in Labor Code section 3602, subdivision (a), the section which sets forth the exclusive remedy provision of the CWCA. Thus, section 4558 is an integral part of the California workers' compensation scheme.

The Court of Appeal in *Ceja v. J.R. Wood, Inc.* (1987) 196 Cal.App.3d 1372, 1377, 242 Cal.Rptr. 531, explained the purpose of section 4558:

> *"The obvious legislative intent and purpose in section 4558 is to protect workers from employers who wilfully remove or fail to install appropriate guards on large power tools.* Many of these power tools are run by large mechanical motors or hydraulically. (Cal. Admin. Code, tit. 8, § 4188.) These sorts of machines are difficult to stop while they are in their sequence of operation. Without guards, workers are susceptible to extremely serious injuries. For this reason, the Legislature passed section 4558, subdivision (b), which subjects employers to legal liability for removing guards from powerful machinery where the manufacturer has designed the machine to have a protective guard while in operation." (Italics added.)

Thus, for purposes of our federal preemption analysis in the present appeal, we construe the California Legislature's enactment of section 4558 as an exercise of state police power for the purpose of protecting the health and safety of workers who use a type of machinery known as a "power press," which is defined in section 4558, subdivision (a)(4), as "any material-forming machine that utilizes a die which is designed for use in the manufacture of other products."

C. *LHWCA*

The Longshore and Harbor Workers' Compensation Act,[8] enacted in 1927, is a workers' compensation statute which created a federal system of no-fault compensation in lieu of tort damages for a class of workers commonly known as "longshoremen," shore-based workers who perform a variety of tasks for, on, and around vessels. (1 Schoenbaum, Admiralty and Maritime Law (2d ed. 1994) § 7-1, pp. 371-373.) Although at that time every state in the United States had a workers' compensation law, longshore workers were excluded from coverage under these state laws because of the maritime nature of their employment.[9] With the enactment of the LHWCA, "[f]ederal and state law were thus linked together to provide theoretically complete coverage for maritime laborers." (*Sun Ship, Inc. v. Pennsylvania, supra,* 447 U.S. at p. 718, 100 S.Ct. at p. 2435.)

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[8] The LHWCA is codified as amended at 33 United States Code sections 901-950.

[9] The history underlying the enactment of the LHWCA is discussed in detail in *Sun Ship, Inc. v. Pennsylvania* (1980) 447 U.S. 715, 100 S.Ct. 2432, 65 L.Ed.2d 458, and need not be repeated here. For purposes of the present appeal, we note only that in 1917 the United States Supreme Court in *Southern Pacific Co. v. Jensen* (1917) 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, declared that the states were constitutionally barred from applying their workers' compensation systems to maritime injuries, and thus interfering with the federal policy of a uniform maritime law. (*See Sun Ship, Inc. v. Pennsylvania, supra,* 447 U.S. at p. 717, 100 S.Ct. at p. 2435.)

1. *Two-prong test for coverage under the LHWCA*

To be covered under the LHWCA, a maritime employee must satisfy both a geographic "situs" test (33 U.S.C. § 903(a)) and an occupational "status" test (33 U.S.C. § 902(3)). Because Lenane and CMSD agree that Lenane's claim for workers' compensation is covered under both the CWCA and the LHWCA, and because the two-prong test for LHWCA coverage is discussed at length elsewhere[10] and is not at issue in the present appeal, we do not discuss the test in detail here.

2. *Exclusivity of the LHWCA, and judicial creation of concurrent federal and state workers' compensation jurisdictions*

Section 905(a) of the LHWCA sets forth an exclusive remedy provision which specifies that LHWCA benefits are the exclusive remedy against an employer who is responsible for them.[11] Although a literal reading of

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[10] See, for example, *Peter v. Hess Oil Virgin Islands Corp.* (3rd Cir.1990) 903 F.2d 935, 938; 1 Schoenbaum, supra, § 7-2, pp. 373-388.

[11] 11. Section 905(a) provides in part:

> "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . . except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee . . . may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury. . . . "

section 905(a) would indicate that it bars all other remedies, the LHWCA does not bar all state remedies against the employer. (*Peter v. Hess Oil Virgin Islands Corp., supra,* 903 F.2d at p. 943.)

Following the Supreme Court's *Jensen* decision in 1917 (discussed, ante), and the enactment of the LHWCA in 1927 which linked federal and state workers' compensation law to provide theoretically complete coverage for maritime employees, it became clear that "the boundary at which state remedies gave way to federal remedies was far from obvious in individual cases." (*Sun Ship, Inc. v. Pennsylvania, supra,* 447 U.S. at p. 718, 100 S.Ct. at p. 2435.) "As a result, the injured worker was compelled to make a jurisdictional guess before filing a claim; the price of error was unnecessary expense and possible foreclosure from the proper forum by statute of limitations. [Citation.]" (*Ibid.*)

To remedy this so-called "*Jensen* line" jurisdictional problem, the Supreme Court in *Davis v. Department of Labor* (1942) 317 U.S. 249, 256, 63 S.Ct. 225, 229, 87 L.Ed. 246 "determined that the border between federal and state workers' compensation schemes was less a line than a 'twilight zone,' in which 'employees must have their rights determined case by case . . . ' [citation]." (*Sun Ship, Inc. v. Pennsylvania, supra,* 447 U.S. at p. 718, 100 S.Ct. at p. 2435.) Within this "twilight zone," *Davis* and other court decisions established a regime of concurrent jurisdiction between the LHWCA and state workers' compensation laws. (447 U.S. at pp. 718-719, 100 S.Ct. at pp. 2435-2436.)

The Supreme Court has summarized the pre-1972 jurisprudence as follows:

> "Before 1972, . . . marine-related injuries fell within one of three jurisdictional spheres as they moved landward. At the furthest extreme, *Jensen* commanded that nonlocal maritime injuries fall under the LHWCA. 'Maritime but local' injuries 'upon the navigable waters of the United States,' . . . could be compensated under the LHWCA or under state law. And injuries suffered beyond navigable waters – albeit within the range of federal admiralty jurisdiction – were remediable only under state law. [Citation.]" (*Sun Ship, Inc. v. Pennsylvania, supra,* 447 U.S. at p. 719, 100 S.Ct. at p. 2436.)

3. *1972 amendments extending LHWCA jurisdiction inland and reaffirming concurrent federal and state workers' compensation jurisdiction*

In 1972, Congress amended the LHWCA to extend its coverage inland beyond the shoreline of the traditional navigable waters of the United States to specific adjoining areas, such as piers, dry docks, and "other adjoining area[s] customarily used by an employer in loading, unloading, *repairing,* dismantling, or building a vessel."[12] (See 33 U.S.C. § 903(a), italics added.)

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[12] Congress also substantially increased the level of compensation available under the LHWCA, and eliminated the so-called "unseaworthiness remedy" under which a longshore employee injured while loading or unloading vessels could pursue a strict liability unseaworthiness award against the vessel upon which he or she was injured. (*Peter v. Hess Oil Virgin Islands Corp., supra,* 903 F.2d at pp. 947-948.)

III. *Analysis*

We turn now to the issue of whether the exclusive remedy provision of the LHWCA preempts and bars Lenane's statutory cause of action for damages under section 4558 which (as we discussed, *ante*) is an integral part of the CWCA and was enacted by the California Legislature in an exercise of its state police powers for the protection of the health and safety of workers in California.

A. *The 1972 LHWCA amendments, which extended federal LHWCA jurisdiction inland, did not preempt state CWCA remedies in the "twilight zone" of concurrent LHWCA and CWCA jurisdiction*

In *Sun Ship, Inc. v. Pennsylvania, supra,* 447 U.S. 715, 100 S.Ct. 2432, the Supreme Court squarely addressed the issue of "whether a State may apply its workers' compensation scheme to land-based injuries that fall within the coverage of the [LHWCA] as amended in 1972." (*Id.* at p. 716, 100 S.Ct. at p. 2434.) After reviewing the express provisions of the LHWCA and its legislative history, the high court held that it may. (*Ibid.*) In so holding, the court not only stated that the 1972 landward extension of federal LHWCA jurisdiction "supplements, rather than supplants, state compensation law," and that the LHWCA as amended does not preempt "state workers' remedies," but also reaffirmed the continued existence of a "twilight zone"[13] in which there is concurrent LHWCA and state workers' compensation law jurisdiction:

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[13] One commentator has stated that "the 'new' twilight zone under *Sun Ship* comprehends not only the landward area newly covered by the 1972 amendments but also the same

> "Absent any contradicting signal from Congress, the principles of *Davis v. Department of Labor, supra* [, 317 U.S. 249, 63 S.Ct. 225], and of *Calbeck v. Travelers Insurance Co.* [(1962)] 370 U.S. 114 [82 S.Ct. 1196, 8 L.Ed.2d 368], direct the conclusion that *the 1972 extension of federal jurisdiction supplements, rather than supplants, state compensation law.* Given that the pre-1972 [LHWCA] ran concurrently with state remedies in the 'maritime but local' zone, it follows that the post-1972 expansion of the [LHWCA] landward would be concurrent as well. . . . [¶] *The language of the 1972 amendments cannot fairly be understood as preempting state workers' remedies from the field of the LHWCA. . . . " (Sun Ship, Inc. v. Pennsylvania, supra,* 447 U.S. at pp. 719-720, 100 S.Ct. at p. 2436, italics added.)

The high court in *Sun Ship* explained that the legislative history of the 1972 LHWCA amendments made clear that Congress understood that this concurrent jurisdiction in the "twilight zone" might result in an injured maritime employee receiving state benefits that would be superior to federal benefits available under the LHWCA:

> " . . . [T]he disparities which Congress had in view in amending the LHWCA lay primarily in the paucity of relief under *state* compensation laws. The thrust of the amendments was to 'upgrade the benefits.' [Citations.] Concurrent jurisdiction for state and federal compensation laws is in no way inconsistent with this policy of raising awards to a federal minimum. . . . [¶] To

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pre-1972 navigable waters 'old' twilight zone." (1 Schoenbaum, *supra,* § 7-4, p. 390, fn. 9.)

> be sure, if state remedial schemes are more generous than federal law, concurrent jurisdiction could result in more favorable awards for workers' injuries than under an exclusively federal compensation system. But we find no evidence that Congress was concerned about a disparity between adequate federal benefits and *superior* state benefits. . . . " (*Sun Ship, Inc. v. Pennsylvania, supra,* 447 U.S. at pp. 723-724, 100 S.Ct. at p. 2438, original italics, fns. omitted.)

The Supreme Court in *Sun Ship* concluded by stating that "[t]he legislative policy animating the LHWCA's landward shift was remedial; the amendments' framers acted out of solicitude for the workers. [Citations.]" (*Id.* at pp. 725-726, 100 S.Ct. at p. 2439.)

Thus, the Supreme Court's decision in *Sun Ship* establishes that the 1972 amendments to the LHWCA, which extended federal LHWCA jurisdiction inland, did not preempt all state CWCA remedies in the "twilight zone" areas in which there is concurrent LHWCA and CWCA jurisdiction and overlapping federal and state workers' compensation coverage for maritime employees such as Lenane. Rather, Congress acted out of "solicitude" for maritime workers with intent to aid them by continuing to recognize the judicially created regime of concurrent jurisdiction, extending LHWCA jurisdiction inland, and "upgrading the benefits" to a federal *minimum,* not a federal maximum, for covered maritime employees who suffer work-related injuries in the "twilight zone" of concurrent jurisdiction. (*Sun Ship, Inc. v. Pennsylvania, supra,* 447 U.S. at pp. 725-726, 100 S.Ct. at p. 2439.) Congress fully understood that in some cases state

remedies may be superior to federal remedies under the LHWCA. (*Id.* at p. 724, 100 S.Ct. at pp. 2438-2439.)

The Supreme Court in *Sun Ship* did not address the specific preemption question we must decide in the present appeal. We now turn to that issue.

B. *The exclusive remedy provision of the LHWCA does not preempt an industrially injured maritime employee's CWCA cause of action for damages under section 4558*

CMSD contends the exclusive remedy provision of the LHWCA[14] preempts the exception to the CWCA exclusive remedy rule which allows a tort action under section 4558. Citing *Peter v. Hess Oil Virgin Islands Corp., supra,* 903 F.2d at page 950, CMSD contends that the section 4558 damages remedy conflicts with the exclusive remedy provision of the LHWCA, and thus "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." We disagree with these contentions.

We begin by noting that *Peter v. Hess Oil Virgin Islands Corp., supra,* 903 F.2d 935, is factually distinguishable in that it involved a Virgin Islands *common law negligence* action, not a Virgin Islands workers' compensation remedy, brought by an injured longshore worker against his employer. (*Id.* at p. 937.) Noting that Congress, in enacting the LHWCA, "intended that compensation, not tort damages, were to be the primary source of relief for workplace injuries for longshoremen against their

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[14] Section 905(a).

employers" (*id.* at p. 952), the federal Court of Appeal for the Third Circuit held that the longshore worker's Virgin Islands common law tort action was barred because it obstructed the "congressional policies advanced by LHWCA. . . . " (*Id.* at p. 937.)

Here, in contrast, Lenane's cause of action against his former employer CMSD is not a state common law tort action. As we have discussed, Lenane's section 4558 cause of action for damages is a state workers' compensation remedy created by the California Legislature in the exercise of its police power for the purpose of protecting the health and safety of workers who use power press machines which, without appropriate guards, can cause extremely serious injuries. (*Ceja v. J.R. Wood, Inc., supra,* 196 Cal.App.3d at p. 1377, 242 Cal.Rptr. 531.) Section 4558 creates an exception to the CWCA workers' compensation exclusive remedy rule in certain cases involving the noninstallation of power press guards. (*Uriarte v. United States Pipe & Foundry Co., supra,* 51 Cal.App.4th at pp. 782-783, 59 Cal.Rptr.2d 332.) That this remedy is an integral part of California's workers' compensation scheme is established by the fact that section 4558 is expressly referenced in section 3602, subdivision (a), the section which sets forth the exclusive remedy provision of the CWCA.

CMSD's other principal case authorities, *Rosetti v. Avondale Shipyards, Inc.* (5th Cir.1987) 821 F.2d 1083 ("simple tort negligence" action under state law is barred by the LHWCA exclusive remedy provision) and *Ghotra v. Bandila Shipping, Inc.* (9th Cir.1997) 113 F.3d 1050 (federal maritime law preempts a wrongful death claim under the California wrongful death statute in the case of a marine

surveyor killed while inspecting a vessel's hold), are factually distinguishable for similar reasons.

We are mindful of the well-established principles which must guide our federal preemption analysis. As we have discussed, *ante*, the United States Supreme Court has held that state law is preempted when it actually conflicts with federal law, and such a conflict will be found where the state law " ' "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress[ ] [citation]." ' " (*Schneidewind v. ANR Pipeline Co., supra*, 485 U.S. at p. 300, 108 S.Ct. at pp. 1150-1151.)

However, the Supreme Court has also held that " ' "[t]he purpose of Congress is the ultimate touchstone" ' of pre-emption analysis. [Citations.]" (*Cipollone v. Liggett Group, Inc., supra*, 505 U.S. at p. 516, 112 S.Ct. at p. 2617.) Based on its respect for state sovereignty and principles of federalism, the high court in ambiguous cases involving federal preemption issues recognizes and applies a "presumption against the pre-emption of state police power regulation." (*Id.* at p. 518, 112 S.Ct. at p. 2618.) Under this presumption against preemption, "[c]onsideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.' [Citation.]" (*Id.* at p. 516, 112 S.Ct. at p. 2617.)

We are not convinced it was the "clear and manifest purpose of Congress" in amending the LHWCA in 1972 to preempt a state workers' compensation remedy such as Lenane's section 4558 cause of action which was created

by the Legislature in the exercise of its state police power to aid workers, including ship repair workers such as Lenane, by protecting them from harm in the use of a specific type of machinery (power presses). On the contrary, the Supreme Court in *Sun Ship, Inc. v. Pennsylvania, supra,* 447 U.S. at pages 723-724, 100 S.Ct. at page 2438, explained that the legislative history of the 1972 LHWCA amendments establishes that Congress understood that concurrent jurisdiction in the so-called "twilight zone" of overlapping LHWCA and state workers' compensation coverage might result in an injured maritime employee receiving state benefits that would be superior to federal benefits available under the LHWCA.

Were we to agree with CMSD's position that the exclusive remedy provision of the LHWCA preempts an industrially-injured California maritime employee's CWCA remedy under section 4558, the net result would be to reduce the level of state workers' compensation benefits available to that employee and all other similarly situated maritime employees. We are persuaded such a result would " ' "stand[ ] as an obstacle to the accomplishment of the full purposes and objectives of Congress[ ] [citation]." ' " (*Schneidewind v. ANR Pipeline Co., supra,* 485 U.S. at p. 300, 108 S.Ct. at pp. 1150-1151.) As we have discussed, *ante,* it was the intent of Congress in extending LHWCA jurisdiction inland in 1972 to supplement, rather than supplant or preempt, state workers' compensation benefits available to maritime employees who suffer work-related injuries in the "twilight zone" of concurrent LHWCA and state workers' compensation law jurisdiction. (*Sun Ship, Inc. v. Pennsylvania, supra,* 447 U.S. at pp. 719-720, 100 S.Ct. at p. 2436.)

California has a legitimate interest in assuring the enforcement of its workers' compensation laws, including the section 4558 exception to the CWCA exclusive remedy rule, with respect to covered injuries sustained within its jurisdiction. In this regard, we agree with the observation of one commentator that because the Supreme Court's jurisprudence has given "free rein" to a covered "twilight zone" worker's choice to pursue his or her remedies under state law, "as a practical matter the determination whether the state worker's compensation law applies will be up to the state not federal courts. [Citations.]" (1 Schoenbaum, *supra*, § 7-4, p. 390, fn. 9.)

In conclusion, we hold that the exclusive remedy provision of the federal Longshore and Harbor Workers' Compensation Act does not preempt an industrially injured, shore-based maritime employee's California Workers' Compensation Act cause of action for damages under section 4558.

DISPOSITION

We reverse the judgment and remand this case to the trial court for further proceedings consistent with this opinion. Lenane shall recover his costs on appeal from CMSD.

WORK, Acting P.J., and McINTYRE, J., concur.

Lenane v. Continental Maritime, et al.

Telephonic Ruling

The telephonic ruling for Friday, October 13, 1995 for case number 685877.

Defendant CMSDI's motion for summary judgment granted as the Court finds as a matter of law that plaintiff's action is barred by the exclusive remedy provisions set forth at 33 U.S.C. section 905(a) which preempts plaintiff's claim for damages under Labor Code section 4558.

Fourth Appellate District, Division One, No. D025295
S069200

IN THE SUPREME COURT OF CALIFORNIA

JAMES LENANE, Appellant

v.

CONTINENTAL MARITIME OF SAN DIEGO INC., Respondent

(Filed May 20, 1998)

Respondent's petition for review DENIED.

Kennard, J., and Baxter, J., are of the opinion the petition should be granted.

GEORGE
Chief Justice